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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 75-682

COLORADO CIVIL RIGHTS COMMISSION
and RAYMOND WENDELL HOLMES,

Petitioners,

v.

COLORADO SPRINGS COACH CO., and
BYRON COWART,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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OPINION BELOW

The opinion of the Colorado Court of Appeals is reported at _____ Colo. App. _____ , 536 P.2d 837 (Petitioners' Brief, Appendix D).

JURISDICTION

Respondents contend that this Court is without proper jurisdiction to grant Petition for Writ of Certiorari because: A. Petitioner's XIV Amendment Constitutional rights were not

specifically set up or claimed in the state courts. B. Adequate and independent non-federal grounds existed for the state court decision of res judicata. C. The issues are not ripe for decision. D. The issues are moot with respect to Respondent, Colorado Springs Coach Company, and E. Co-Petitioner, Colorado Civil Rights Commission, has no standing to pursue this case on appeal.

Petitioners allege jurisdiction of this Court under 28 U.S. 1257 (3). (Petitioners' Brief at 2). Petitioners have not alleged, however, that any Colorado statute is repugnant to the Constitution, treaties or laws of the United States. Petitioners' jurisdiction allegation, therefore, must rest upon a title, right, privilege or immunity specially set up or claimed under the Constitution of the United States.

A. *Petitioner, Holmes', XIV Amendment Constitutional rights were not specially set up or claimed in the state courts.*

No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U.S. 323, 331; *Barbour v. Georgia*, 249 U.S. 454, 460; *Whitney v. California*, 274 U.S. 357, 360, 362, 380. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adhers to it in cases from state courts. See Brandeis, Jr. concurring in *Whitney v. California*, supra, 380.

This Court has held that federal constitutional issues must be specifically set up or claimed prior to a decision issued in the case by the state supreme court. *Spies v. Illinois*, 123 U.S. 131 (1887); *Winona and St. Peter Land Company v. Minnesota, (2)*,- 159 U.S. 540 (1895). Federal constitutional issues raised before this court for the first time on review of state court decisions will

not be decided. *Tacon v. Arizona*, 410 U.S. 351 (1973); *Cardinale v. Louisianna*, 394 U.S. 437 (1969); *Monks v. New Jersey*, 398 US 71 (1970).

The issue whether a federal question was sufficiently and properly raised in the state courts is, itself, ultimately a federal question, as to which this Court is not bound by a decision of the state courts. *Street v. New York*, 394 U. S. 576 (1969). In order to vindicate this Court's jurisdiction to deal with this particular issue, it must inquire whether that question was presented to the state courts in such a manner that it was necessarily decided by the state supreme court. *Street*, supra, at 581.

This Court has stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Street*, supra, 582.

In the instant case, the Colorado Supreme Court did not issue a decision, but merely denied certiorari to hear the case. (Petitioners' Brief at 5.) The Colorado Court of Appeals was the highest state court to issue an opinion in this case, (Petitioners' Brief at 5) but there the court issued its opinion based upon a Colorado Supreme Court ruling as precedent. (Petitioners' Brief, Appendix D, at 34.) There was no discussion as to federal constitutional rights. This case is not the same, therefore, as that of *Colorado Antidiscrimination Commission, et al, v. Continental Airlines, Inc.*, 372 U. S. 714 (1963), where the Colorado Supreme Court interpreted its own statutes in light of, and in relation to, federal law, nor is this case the same as that of *Department of Motor Vehicles of the State of California v. Rios*, 410 U. S. 425 (1973), where the California Supreme Court apparently interpreted its own statutes in light of the California Constitution or the United States Constitution, or both.

In *De Backer v. Brainard*, 396 U. S. 28 (1969) the appellant did not make his constitutional claim before the trial court judge; he raised the issue on appeal to the state district court but that court did not pass on the issue; he did not press the district court's failure to consider that issue in his appeal to the state supreme court, and made only passing reference to the issue in his brief to that court. The opinion of that state supreme court did not pass on the issue, or ever refer to the contention. This Court, therefore, refused to rule on the issue. *De Backer*, supra, at 32.

In *Cardinale v. Louisianna*, supra, this Court explained its reasoning for refusing to hear a federal constitutional issue raised for the first time on appeal from the state supreme court:

> ". . . questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though states are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 US 92 (1966) . . . 'they should be given the first opportunity to consider them.' "

Although no particular form of word or phrases is essential to raise a federal constitutional issue, ". . . it is essential that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time."- *Street v. New York*, supra, at 584. In the instant case, Petitioners did not raise the issue of violation of due process or discrimination on the basis of wealth under the XIV Amendment to the United States Constitution at any time to any of the

Colorado state courts. It is true, that in its application for writ of certiorari from the Colorado Supreme Court, the Petitioners did complain of Petitioner, Holmes, being made to have an "unconscionable choice" as to his pursuit or remedies. (Petitioners' Brief at 4, 5.) Respondents contend, however, that this was not a sufficient means of bringing a federal constitutional issue to the attention of the supreme court with fair precision.

Because Petitioners failed to specially set up or claim a title, right, privilege or immunity under the United States Constitution by making a timely assertion before the state courts, this Court should find that it has no jurisdiction to hear Petitioners' constitutional arguments on appeal.

B. *Adequate and independent non-federal grounds existed for the state court decision of res judicata.*

This Court will not review a state court's decision resting on an adequate and independent non-federal ground. *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). The Colorado district court found that the principle of res judicata should be applied in the instant case because to allow Petitioner, Holmes, to prosecute a claim before another state agency, under the same evidence, would tend to create an impossible situation for the courts. (Petitioners' Brief, Appendix C, at 30.)

The Colorado Court of Appeals, upon review of the instant case on appeal from the district court, cited language in a previous Colorado Supreme Court decision: Umberfield v. School District No. 11 _____ Colo. _____, 552 P.2d 730 (1974), wherein the Colorado Supreme Court applied the doctrine of res judicata on the grounds that:

> ". . . *To hold otherwise could result in an anomalous situation where the same reviewing court would be compelled to affirm opposite results of the two administrative bodies.*" *(Petitioners' Brief, Appendix D, at 35.)*

Preventing anomalous and confusing decisions with regard to its own state agencies, is an adequate and independent non-federal ground for state court decisions.

Because adequate and independent non-federal grounds were the basis of the judgments of the state courts in the instant case, this Court should find that it has no jurisdiction to hear Petitioners' constitutional arguments on appeal.

C. *Petitioner, Holmes', constitutional issues are not ripe for decision.*

Where a party alleges that he has been denied a constitutional right under Title VII of the Civil Rights Act of 1964, in the area of employment discrimination, he is entitled to pursue a separate course of action under that federal statute in federal district court, 42 USC 2000e-5(e). Petitioner, Holmes, has filed a claim with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964. (Respondents' Appendix I, at.) As this Court stated in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947):

> "... the power of courts and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough . . ." *United Public Workers*, supra at 89-90.

Because Petitioners' allegations of denial of constitutional rights are not ripe, this Court should deny jurisdiction to hear such allegations in this appeal.

D. *The issues are moot with respect to Respondent, Colorado Springs Coach Company, and with respect to Petitioner, Holmes', allegations of denial of federal constitutional rights.*

Federal courts are without power to decide questions that cannot affect the rights of litigants in a case before them. *North Carolina v. Rice*, 404 U.S. 244 (1971); *DeFunis v. Odegaard*, 416 U.S. 312 (1974). For purposes of federal court jurisdiction, an action is rendered moot if it can be said with assurance that there is no reasonable expectation that the alleged wrong will be repeated. *United States v. W. T. Grant Company*, 345 U.S. 69 (1953); *DeFunis v. Odegaard*, supra. With regard to the question of a case's mootness, the usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *Roe v. Wade*, 410 U.S. 113 (1973); *DeFunis v. Odegaard*, supra.

Since Respondent, Colorado Springs Coach Company, at the time Petitioner, Holmes, was granted his award by the Civil Rights Commission, had ceased its operation of the city bus lines, (Petitioners' Brief, Appendix C at 31) and was only authorized by the Public Utilities Commission to operate charter trips outside the city, and that at the time of the hearing before the district court, was in the process of and thereafter did cease operation even under its P.U.C. Charter authority and was no longer making any disposition whatsoever as to employment of individuals, it can be said with assurance that there is no reasonable expectation that the alleged wrong will be repeated.

Because of Petitioners' allegations of denial of federal constitutional rights are moot, this Court should deny jurisdiction to hear such allegations on appeal.

E. *Co-Petitioner, Colorado Civil Rights Commission has no standing to pursue this case on appeal.*

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U. S. 150 (1970), this Court held that, to show proper standing, the petitioner must first allege some type of injury in fact and second, the injury must be arguably within the zone of interests to be protected and regulated by the statute or constitutional guarantee in question.

Petitioner, Colorado Civil Rights Commission, has no injury in fact insofar as having such a personal stake. Petitioners's injury in fact must be such an injury as to have a personal stake in the outcome of the controversy to assure the concrete adverseness requisite to a proper presentation of issues for adjudication.- *Baker v. Carr*, 369 U.S. 186 (1962).

Petitioners have alleged that Petitioner, Holmes, and others similarly situated will be denied various XIV Amendment guarantees if a decision of res judicata is found. (Petitioners' Brief at 6.) Respondents do not dispute that Petitioner, Holmes, has a personal stake in the outcome of the controversy. Neither do Respondents dispute that Petitioner, Holmes, is arguably within the zone of interests to be protected and regulated by the alleged violations of the XIV Amendment guarantees.

Respondents do dispute, however, that the Colorado Civil Rights Commission has been either injured in fact, or that it is arguably within the zone of interests to be protected and regulated by the XIV Amendment. The most that can be said is that if this court finds that a Colorado Industrial Commission decision is res judicata with regard to a subsequent Colorado Civil Rights Commission decision, the Colorado Civil Rights Commission will be unable to maintain its current case load. The Respondents contend that such an occurrence is neither an injury in fact, nor is the maintenance of the case load of the petitioning Commission at its current level arguably within the zone of interests to be protected and regulated by the XIV Amendment to the United States Constitution.

This Court has held that "to have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it." *Board of Regents v. Roth*, 408 U.S. 574, 577 (1972). If this Court finds that a Colorado Civil Rights Commission has sufficient standing to pursue this case on appeal as a co-petitioner, then the maintenance of the Colorado Civil Rights case load is a legitimate claim of entitlement under, and is

arguably within the zone of interests to be protected and regulated by, the XIV Amendment to the United States Constitution. Respondents contend that the maintenance of a state administrative agency's work load is not even remotely within the zone of interests to be protected and regulated by the XIV Amendment.

For the above reasons, this Court should find that the Colorado Civil Rights Commission has no standing to pursue this case on appeal.

RESTATEMENT OF THE CASE

Petitioner, Raymond Wendell Holmes, was first employed by Respondent, Colorado Springs Coach Company, in July of 1969. In March of 1970, Petitioner, Holmes, voluntarily terminated his employment. In August of 1970, Petitioner was rehired by Respondent until February 15, 1971, when Petitioner's employment was terminated for "failure to work assigned runs." Subsequent to his termination, Holmes filed a claim with the Industrial Commission of Colorado (serving ex-officio as the Unemployment Compensation Commission of Colorado) for unemployment compensation benefits. The Commission's deputy denied Holmes' claim. Holmes then took an appeal, the notice of which (R Appendix II) referred to termination because of racial discrimination. On April 19, 1971, Holmes' appeal was heard by the Referee who stated in her Decision that she "found no evidence of racial discrimination" and that Holmes "was responsible for his discharge and is entitled to No Award of benefits." (R.Appendix III.) Holmes then filed his Notice of Appeal to the Industrial Commission of Colorado, continuing to allege racial discrimination, and the Industrial Commission, in its Order of June 10, 1971, affirmed the Decision of the Referee. (P. Appendix A). Thereafter, Holmes did not seek review of this order by either the Industrial Commission or the courts.

On March 30, 1971, Holmes filed his complaint against Respondents alleging racial discrimination with the Equal Employment Opportunity Commission, which matter is still pending, as well as with the Colorado Civil Rights Commission. In its answer to the complaint, Respondent, Colorado Springs Coach Company, asserted the defense of res judicata, as well as a general denial of racial discrimination. On September 15, 1972, pursuant to notice a hearing was held before the Civil Rights Commission's hearing officer, who asked if both parties were ready to submit briefs or oral arguments on the matter of res judicata. Petitioners submitted their brief and Respondents gave oral arguments. The hearing officer refused to rule on this issue and the hearing was recessed. (Reporter's Transcript, Vol. I, pp. 11; Claimant's Exhibit 5.) On March 16, 1973, the hearing before the Civil Rights Commission resumed and the hearing completed. On September 24, 1973, the hearing officer issues his Initial Decision in favor of Holmes, ruling therein that Respondent was guilty of racial discrimination and ordered Holmes' reinstatement with back pay. (P.Appendix B at 24.) After the expiration of thirty (30) days, his decision automatically became the decision of the Civil Rights Commission.

Respondent, thereafter, petitioned the El Paso County District Court for judicial review of the decision of the Civil Rights Commission. The hearing on this petition was held June 7, 1974. On August 14, 1974, the Honorable, Hunter D. Hardeman, issued his order setting aside the decision of and dismissing the complaint before the Civil Rights Commission, by finding and concluding that (1) the facts necessary to support a fair inference of discrimination were not present in this case; (2) the doctrine of res judicata operates as a bar to the Civil Rights Commission, and (3) that the Commission exceeded its authority in the remedies afforded to Petitioner, Holmes.

Petitioner appealed the district court's decision to the Colorado Court of Appeals, and on March 11, 1975, this court

upheld the lower court's decision, holding that the doctrine of res judicata barred the Civil Rights Commission from hearing the charge of racial discrimination. Holmes petitioned for a rehearing, which petition was denied.

Subsequently, Holmes petitioned for a writ of certiorari from the Colorado Supreme Court, which court denied the petition on July 7, 1975.

REBUTTAL ARGUMENTS
REASONS FOR DENYING WRIT

Petitioners state that the court below denied due process rights to Petitioner, Holmes, by relegating him to "truncated procedures." (Petitioners' Brief at 11.) Respondents contend that the application of *res judicata* is proper because Holmes was afforded both substantive and procedural due process through a full hearing and judicial review, and that his legal remedies under Title VII of the Civil Rights Act of 1964 have not yet been exhausted.

I. PETITIONER, HOLMES, NOT DENIED DUE PROCESS.

A. Substantive Due Process Afforded Holmes:

1. The Industrial Commission is equally competent to render a just decision as to the reason for Holmes' discharge.

Petitioners point to this Court's decision in the case of *Brinkerhoff-Faris Trust and Savings Co., v. Hill*, 281 U. S. 673 (1930) as a basis for their argument that Holmes was denied an opportunity to be heard. (Petitioners' Brief at 7-8.) *Brinkerhoff*, however, is not on point because the petitioner there had been denied all opportunities to be heard by the state courts. Petitioner, Holmes, on the other hand had afforded to him two

remedies for his complaint, either through the Industrial Commission or the Civil Rights Commission of Colorado.

In addition, Petitioners' "waiver" argument is inappropriate. The issue here is res judicata, not "waiver". Holmes elected to pursue his claim before the Industrial Commission at the outset. Respondents do not contend that, by doing so, Holmes in any way "waived" his right to be heard before the Colorado Civil Rights Commission. By electing such a course of action, however, the Colorado courts have decided that Holmes was precluded from bringing the same claim before another administrative agency. *Umberfield v. School District No. 11* _____ *Colo.* _____, 522 P.2d 730 (1974).

Petitioners further state that it would not be inconsistent to find both that an individual had been discharged because of his race and that he was ineligible for award on other grounds. (Petitioners' Brief at 10.) In order to make a decision as to whether Holmes was entitled to a benefit award, the Industrial Commission had to decide whether Holmes was discharged "through no fault of his own". (C.R.S. 1973, 8-73-108 "Benefit Awards", Petitioners' Appendix E at 48.) As the district court judge stated the issue:

> "In making its decision on unemployment compensation, the Industrial Commission *necessarily* had to decide whether the discharge was the result of a discriminatory act or whether it resulted from misconduct on the part of the claimant." (Petitioners' Appendix C at 29) (Emphasis added.)

Petitioners did not state any hypothetical situations where such an inconsistent decision could be reached, and Respondents contend that such inconsistency is such a remote possibility as to approach the point of impossibility.

Petitioners further contend that it is implicit in the decision now at issue that the unemployment compensation officer was not competent to decide cases of racial discrimination. (Petitioners' Brief at 10-11), and that Holmes was relegated to a procedure before agency officers with "no expertise in employment discrimination." (Petitioners' Brief at 1, 11). Respondents contend that the Industrial Commission was at least as competent as the Civil Rights Commission in reaching a decision as to why Holmes was discharged from his place of employment. In the case of *McGin v. Industrial Commission*, 496 P 2d 1080 (1972), the court of appeals states:

> "The Industrial Commission, serving ex-officio as the Unemployment Compensation Commission, is authorized by statute to make findings of fact. Such authority includes the power to determine the credibility of the witness and the weight to be given their testimonty ... The Commission has the ultimate responsibility for making the final findings of fact necessary to support its decision."

As District Judge, Hardeman, noted in his review of the Civil Rights Commission proceedings:

> "... the Industrial Commission is given broad powers and discretion in granting unemployment compensation, the amount of such award being dependent to a large extent on the reason for Claimant's unemployment. Surely this body could consider the employee's claim of discrimination as well as the reasons advanced by the employer for his discharge in making their decision." (Petitioners' Brief, Appendix C at 29-30.)

In other words, both agencies, in order to reach their respective decisions, had to make a factual finding as to the reason for Holmes' discharge.

Petitioners would assert that the Colorado legislature has, presumably in favor of the Civil Rights Commission's jurisdiction, "balanced the competing interests and devised an adjudicatory process which provides substantial protections to the complainant in employment discrimination cases." (Petitioners' Brief at 11.) Although the intent of the Colorado legislature as to the extent of the jurisdiction of its state regulatory agencies is not relevant to any discussion of federal constitutional rights, Respondents submit that the Colorado Supreme Court has interpreted the legislative intent with regard to the Colorado Civil Rights Commission's jurisdiction.

In the instant case, and in *Umberfield v. School District No. 11* ____ *Colo.* ____, 522 P.2d 730 (1974), the Supreme Court decided that, where the Colorado Civil Rights Commission has concurrent jurisdiction with another state administrative agency, a prior decision reached by another agency upon the same claim will, on the principle of res judicata, preclude the Colorado Civil Rights Commission from considering that claim. The Colorado rule of statutory construction is that legislative intent is to be ascertained and given effect wherever possible, *Alvarez v. District Court in and for the City and County of Denver*, 525 P.2d 1131 (Colo. 1974); *People v. Stevens*, 517 P.2d 1336 (Colo. 1973); *People v. Sneed*, 514 P.2d 776 (Colo. 1973), and a statute may not be construed in such a way as to defeat an obvious legislative intent. *People v. Meyers*, 510 P.2d 430 (Colo. 1973); *People v. Lee*, 506 P.2d 136 (Colo. 1973).

This Court has held that the resolution of statute or constitutional issues is the primary responsibility of the courts. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Colorado Supreme Court has already interpreted the intent of that state's legislature with regard to the Civil Rights Commission's jurisdiction. Petitioners, however, are asking this Court to find that the Colorado Supreme Court incorrectly interpreted the legislative intent with regard to the Civil Rights Commission's jurisdiction. That court is the final judicial determinor of the

legislature's intent and this Court has no power to say that the Colorado Supreme Court's decision is inaccurate.

Thus, Respondents submit that Holmes has not been denied access to a tribunal competent to render a just decision as to the reason for his discharge.

2. Colorado statutes provide for judicial review.

Even though Holmes failed to win his case before the Industrial Commission, his rights were protected by the safeguard of judicial review. (C.R.S.1973, 8-74-108, Petitioners' Brief, Appendix E at 62; C.R.S.1963, 82-5-10, Appendix IV.)

Upon judicial review the findings of the commission as to the facts would be conclusive, "if supported by substantial evidence." (C.R.S.1973, 8-74-109, Petitioners' Brief, Appendix E at 62-63; C.R.S.1969, Perm.Supp. 82-5-11, Appendix V.)

Holmes failed to avail himself of judicial review of the Industrial Commission's decision. (Respondents' Brief at 15.) Holmes' failure to seek such review is not a denial of due process.

3. Title VII rights, under the Civil Rights Act of 1964, are still available to Holmes.

As previously stated, Holmes still has a remedy available to him under Title VII of the Civil Rights Act of 1964. (Respondents' Brief at 12.) Respondents contend that it is impossible for Holmes to be denied due process when adequate remedies are still available to him.

Holmes was not denied substantive due process under Colorado law because he was entitled to a hearing as to the reason for his employment discharge and such hearing was subject to judicial review. In addition, Holmes still has an adequate remedy available to him under Title VII of the Civil Rights Act of 1964.

B. Procedural Due Process Afforded Holmes:

1. Petitioner, Holmes, was given full hearing.

After discharge, Holmes chose not to file a grievance with his labor union, Amalgamated Transit Union, Local No. 19; but instead, filed for unemployment compensation benefits. On appeal of the first "No Award" decision, the Industrial Commission's referee had the statutory duty of determining the reason for Holmes' discharge. (C.R.S.1973, 8-73-108, "Benefit Awards", Petitioners' Brief, Appendix E at 48.)

At the referee's hearing, Holmes was given the opportunity to appear personally, (Reporter's Transcript, Respondents' Exhibit 4, at 29, Appendix VI), was allowed to testify in his own behalf, (Reporter's Transcript, Respondents' Exhibit 4, beginning at 29, Appendix VI), allowed to make his allegations of racial discrimination, (Reporter's Transcript, Respondents' Exhibit 4, at 29, 31, 32 & 33, Appendix VI), allowed to cross-examine witnesses, (Transcript continued, at 35, 37, 39 & 40, Appendix VI). It is true that Holmes was not represented by counsel, but neither were Respondents represented by counsel (Reporter's Transcript, Respondents' Exhibit 4, at 29, Appendix VI.) Petitioners do not contend that Holmes was denied the opportunity to be represented by counsel, and there is nothing in the record indicating that Holmes was unable to obtain his own counsel, e.g., a legal services attorney. The referee concluded that there was "no evidence of racial discrimination"; but rather, Holmes was "found to be responsible for his discharge." (Appendix III at No. 51.)

Petitioners contend that Holmes was denied the opportunity to be heard on his claim of discrimination, was relegated to a "truncated procedure" before the referee of the Industrial Commission, and in general was denied a "fair trial" before a "fair tribunal". (Petitioners' Brief at 9.) Petitioners fail to show, however, how the procedures of the Civil Rights Commission

significantly differ from the procedures followed at the hearing before the Industrial Commission's referee. Since Holmes was present at the hearing on the issue of his discharge from employment, was given the right to testify on his own behalf, was allowed to state his claim of racial discrimination, was allowed to cross-examine witnesses, was not denied the assistance of counsel, and received an explicit decision from the referee with regard to his claim of racial discrimination, it can hardly be said that Holmes was denied a "fair trial" before a "fair tribunal".

2. Judicial review was afforded Holmes.

Instead of appealing the ruling of the Industrial Commission, Holmes chose to pursue his case in the Colorado Civil Rights Commission, as set out in Respondents' Restatement of the Case. Respondents appealed the decision of that agency to the district court pursuant to C.R.S.1973, 24-34-308. (Petitioners' Brief, Appendix E at 46-47.) The district court was required to uphold the Civil Rights Commission's ruling if that ruling was supported by substantial evidence. (C.R.S.1973, 24-34-308(6), Petitioners' Appendix E at 47.) The Honorable, Hunter D. Hardeman, district court judge, cited in support of his ruling the case of *Colorado Civil Rights Commission v. School District No. 1*,- Colo.App. 448 P.2d 83, wherein the Colorado Court of Appeals stated in part:

> "In determining whether the Commission's order should stand, the question is not whether this court would come to an identical conclusion upon the evidence certified to it. A court cannot, upon the record of the proceedings before the hearing tribunal, substitute its own discretion for that reposed by statute in that tribunal. Due consideration must be accorded the presumption that an administrative body has acted fairly with proper motives, upon valid reasons and not arbitrarily. *Draper v. Clark Dairy, Inc.* 17 Conn.Supp.

> 93. (Cty.Sup.Ct.). Judicial review of findings made by an administrative body such as the Civil Rights Commission is limited to the question of whether, based upon the entire record, the findings are supported by evidence so substantial that an inference of the existence of a fact may be reasonably drawn. *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581."

Thus, Judge Hardeman, not only considered all of the facts presented in the "fair trial" before the "fair tribunal" (the Civil Rights Commission), but he rejected them and concluded that "facts necessary to support a fair inference of discrimination are not present in this case." (Petitioners' Brief, Appendix C at 31.) Petitioner, Holmes, therefore, was provided with the safeguards required to achieve procedural due process.

II. APPLICATION OF *RES JUDICATA* DOES NOT DISCRIMINATE AGAINST PETITIONER, HOLMES, ON THE BASIS OF WEALTH.

The Colorado legislature did not intend to subsidize Civil Rights claimants by negating the "no fault" concept for unemployment compensation through the enactment of the Civil Rights Act. Petitioner, Holmes, asserts that the application of the res judicata doctrine creates discrimination on the basis of wealth. It is a necessary corollary to such assertion that the Colorado legislature intended to create for petitioner the opportunity to apply for and receive unemployment compensation regardless of fault or no-fault, and while being so subsidized, to pursue his claim for further finaicial aid and other assistance through the media of the Civil Rights Commission. That to deny Holmes such subsidy from unemployment compensation, regardless of fault or no-fault is an unreasonable interpretation of the two legislative acts by the Colorado courts.

It is submitted that had the legislature intended such result, it would have been a simple task to have spelled out such

legislative policy in the creation of the Civil Rights Commission legislation. The Unemployment Compensation Act of the State of Colorado, the Civil Rights Act of the State of Colorado and the interpretation of such legislation by the Colorado courts is to the contrary. The cases cited by Petitioners under their Augument II are readily distinguishable: *Harper v. State Board of Elections*- (Petitioners' Brief at 12), require the payment of a fee (poll tax); the case of *Griffin v. Illinois*, required payment for trial transcripts; *Douglas v. California*, required the hiring of an attorney; (Petitioners' Brief at 12), *Smith v. Bennett*, required the payment of a filing fee; (Petitioners' Brief at 13), *Boddie v. Connecticut*,- required payment of court costs and *Lindsey v. Normet*, required a tenant to post a double bond on appeal. (Petitioners' Brief at 14.)

As the Colorado Supreme Court said in the case of *Almarez v. Carpenter*, 173 Colo. 320, 477 P.2d 792 (1970):

> "The plaintiffs seem to equate the administration of justice with affluence. They imply that the balance of the scales of justice is invariably tipped by the financial condition of the litigants. This attitude is as unfortunate as it is unfair. If this were true, workmen would always lose workmen's compensation cases, banks would invariably prevail against the small business man and taxpayers would never succeed in challenging the government. A cursory review of reported decisions will dispel this theory. Many cases, in fact, are affirmed where there is no appearance by the appellee. The profit and loss statements and bank balances of the litgants do not concern courts in their neverending efforts to mete out justice.
>
> To suggest that there is any way, or that it is constitutionally essential, to equalize the financial resources, the competence of opposing counsel and all other

> items that might tend to influence the ability of one side or the other to prevail in a lawsuit is to intimate that there is no possible way to obtain justice under our system."

Petitioners suggest that the only reason for the application of the doctrine of res judicata in the instant case is one of judicial economy. As the court of appeals stated in review of the decision of the district court, the compelling reason for applying res judicata was to prevent confusion in the court system by compelling the same reviewing court to affirm opposite results of two administrative bodies. (Petitioners' Brief, Appendix D at 35.)

Respondents submit, therefore, that the Colorado legislature did not intend to subsidize litigants in a Civil Rights matter by compelling payment to them of unemployment compensation disregarding a "no fault" tenet.

III. APPLICATION OF *RES JUDICATA* DOES NOT DEPRIVE PETITIONER, HOLMES, AND OTHERS SIMILARLY SITUATED OF FEDERAL RIG RIGHTS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Respondents earlier stated in their Brief that Petitioner, Holmes, has not yet elected to avail himself of his Title VII rights under the Civil Rights Act of 1964. Therefore, this issue is not ripe for this Court's decision on certiorari.

Respondents would summarize their response to the allegations of Petitioners Argument III as follows:

1. No action taken by the Colorado courts have in any way denied Petitioner, Holmes', Title VII rights.

2. Holmes has had three hearings before the Industrial Commission, one hearing before the Civil Rights Commission and two

hearings before the district court and court of appeals, as well as a review of the district court and court of appeals, as well as a review of the district court and court of appeals' actions by the Colorado state supreme court. Each hearing and review, except that before the Civil Rights Commission, has been a denial by the commission and the courts that Holmes was discriminated against because of his race. Having thus been afforded his day in court before so many commissions and court hearings, equal protection of the laws guaranteed under the XIV Amendment would dictate that the Colorado Springs Coach Company should not have to further defend the action taken on February 15, 1971, terminating Holmes' employment.

For the reasons given above, Petitioner, Holmes', Petition for certiorari should be denied.

APPENDIX VI

Relevant Parts from Reporter's Transcript of Hearing Before Industrial Commission's Referee. (Respondents' Exhibit 4.)

(Transcript pages noted "pp. _____ ")
(Omissions noted "*")

THE REFEREE: This is the unemployment compensation case of Raymond Wendell Holmes, whose Social Security Number appears in the file as 458-58-4796.

This case is being heard on April 19, 1971, at 2:00 P.M., at Colorado Springs, before Referee Mary K. Rodge.

This is an appeal by the claimant from *two decisions*,- granting No Awards. The purpose of the hearing is to determine whether the claimant is entitled to benefits.

The claimant appears in person. There are two employers involved in this hearing. Colorado Springs Coach Company is represented by Byron Cowart, President and General Manager; William Cooper, Superintendent of Transportation, and O. B. Pumphrey, Shift Foreman. pp. 1*

RAYMOND WENDELL HOLMES, the claimant, being duly sworn, testifies as follows in his own behalf: pp. 2*

Now, Mr. Cowart stated that I voluntarily quit. Which I think he had the dates mixed up, February the 5th. It was February the 13th, 1971. But I didn't quit, I was fired and I have the letter to prove that I was fired, and I feel very strongly it was racial problem there somewhere.

A Well, now on February 13th, Saturday, you tell me you

were injured and you didn't—the next thing you heard from the company was a letter that you received on Monday the 15th?

A That's right, that I was fired.

Q Do you wish to introduce that letter into evidence or do you wish to read it into the record?

A Well, I can read it or you can, either one. I have it here somewhere. It says, "You are hereby notified effective this date, your employment with Colorado Springs Coach Co., has been terminated. This action has taken place for failure to work assigned runs posted for reason not in the best interests of the department. All company belongings or propertys are to be turned in by February the 20th, 1971."

Q And the date of that letter, Sir?

A The date of this letter is February 15th, 1971. pp. 4*

Q Had you any no shows on your record that you recall?

A Yes, I had some no shows on my records yes. But the point is that you're supposed to be—you're supposed to have three no shows before that you can be suspended.

Q That was according to the company-union contract?

A The rules, yes, the company policies. And there have been a lot of fellows that had these and been suspended for three days, and not fired until they completely messed up real bad. pp. 5*

Q Did you file a grievance on this?

A No, I didn't.

Q Do they have a grievance procedure? Is it possible to file a grievance?

A What was the question?

Q Does the union have a grievance procedure if you don't like a dismissal or suspension or something, you have the right to file a grievance?

A I'm not sure, I'm not positive.

Q What union do you belong to?

A It's a —

MR. COWART: May I fill that in for him?

THE REFEREE: Yes, Mr. Cowart, if you would.

MR. COWART: Amalgamated Transit Union Local No. 19.

A (By the claimant) So then can I continue?

Q (By the Referee) Yes.

A And there has been a number of fellows that have met these qualifications of not showing up, and they were suspended. And after the three day's suspension they would come back to work. And the day I was fired Mr. Edgel (Phonetic spelling) was on the board OTR for approximately two weeks. He was on the board approximately two weeks.

Q You're talking about some other employee?

A Yes, some other employee there that didn't show up for three days and he was also suspended for three days — pp. 6*

•

Cross Examination of Raymond Wendell Holmes by Byron Cowart

Q Well, I'm surprised that if you calim their were racial conditions, why did you come back?

A Well, I didn't necessarily hear—say there were racial conditions involved the first time, did I? I just mentioned that the conditions were much better the first time than the last. pp. 7*

Q Well, this is my question as to when these alleged racial conditions took place?

A Well, personally I think it taken place on February 13, 1971, when you immediately fired me and there has been a number of white boys that's been down there. They have had 10 times more no shows than me, and was not fired. Now, if you don't call this a racial thing, I'd like to know what you call that. I'd like to know your definition of this thing. Why is it that you fired me, so quickly, I'm aware that in this country and at the Colorado Springs Coach Co., also, that Negroes are the first to be, last to be hired, and the first to get fired. Now, I thought you was on the up and up, well, really I have doubts as far as that is concerned, because I understand this thing and I've analyzed you psychologically and I understand it. But the point is, just as I said a while ago, that there has been a number of white boys and I'm going to say white specifically because I'm going to get down to the nitt-gritty, I'm going to tell you just like it is, just how I feel. Has been on the board for no show, for days, days, days, and if they just mess up too bad, and then you will give them a three-day suspension. I know a boy that's just got fired just before that I did had three in a row. Three suspensions in a row, and then you finally seen that the man wasn't any good—

THE REFEREE: Well, Mr. Holmes, I'll have to tell you again. I cannot go into the separations of all the employees that work for this company. pp. 8*

Q My question to Ray is did he not report for work at the 2:20 run on Saturday afternoon the 13th? You did not show up?

A Well, that I think is very plain, I didn't, though that's not why you fired me.

Q Did you show up on the 14th?

A No. I supposed that I would have justice just like any other white boy you put me on no show and OTR.

THE REFEREE: Will you please answer his question, sir. He asked if you showed on the 14th?

A No, I didn't. No, I didn't.

Q Did you show on the 15th?

A No, I come down and I got the letter and to tell you that I'd been sick.

Q I'd like to ask you about this phone call which you stated briefly you are familiar with our phone system? pp. 9*

A Yes.

Q And is it your testimony that nobody answered the phone?

A Right.

Q Do you remember approximately what time this was?

A Well, it was immediately after I came from the doctors' approximately 1:00 or 1:30, something like that.

Q And you did not call in on the 14th or the 15th?

A No, I supposed that I would be on OTR, just the same as all the other boys that I had been seeing on the board OTR.

Q In your previous sick report, didn't you always call in, and let them know you were sick?

A Yes, I called in on February the 13th.

Q Prior to February the 13th?

A Yes, I said, yes, I called in also on February the 13th.

Q So no one answered the phone on the 13th?

A No, it's on answering service as you know that you switch it on answering service after 12:00 o'clock. Do you do that?

Q Are you familiar with the two telephone numbers that we have?

A Yes, I do, but I couldn't memorize it.

THE REFEREE: Why not? — O.K.

Q The Coach Company has two telephones, one which is switched on to automatic answering service, the second number posted on the bulletin board many times for all operators to use, in the case of an operational change or a reporting in, or so forth. Now, haven't you used that other number before?

A Oh, yes, I had. But I said I didn't remember it as this time. I didn't remember it.

Q You didn't remember it the following day, or the following day? pp. 10*

A No, as I stated. I've stated this three times that I thought that I would be on the board as your other fellows that you would work as OTR or as no show. And there wasn't any point. I should have known better. I should have known better, but I didn't.

Q You mentioned one other employee, Mr. Edgel (phonetic spelling). Do you know whether or not he was discharge?

A No, I don't. No, I don't.

Q Since the claimant was referring to Mr. Edgel, I have before me a letter dated February 15th, in which it says essentially the same thing. "That you are hereby notified that your employment with the Coach Company is terminated effective this date." So, I would just like the record to show that.

A Yes, I have a question.

THE REFEREE: Yes, one minute.

MR. COWART: I'm through with my questioning.

THE REFEREE: All right. Mr. Holmes, in view of this cross examination you have a further statement, go ahead.

A Yes, I have one question. Now, Mr. Edgel was on the board, as you have knowledge of, as OTR, for approximately how long? I just want to get your estimation of it?

MR. COWART: I don't know the exact dates.

A O.K. Well, I do. He was on the board at least a week and a half. At least a week and a half, but you didn't seem to find it necessary, wasn't concerned about me and my family or nothing. And you're jeopardizing my family when you send me a letter and say that I'm fired just because I was sick and couldn't show up. I think you're jeopardizing my family.

MR. COWART: I wish to refute this statement made by Mr. Holmes, to the effect that telephone contacts had been made with Mrs. Edgel, describing his sickness and the exact condition during part of this time. And what the reference to lengthy OTR is not even the same in the two cases.

THE REFEREE: All right. Mr. Cowart, was a grievance procedure opened to the claimant? Is it possible to have a grievance procedure through the union? pp. 11*

MR. COWART: Yes.

THE REFEREE: Was any grievance filed?

MR. COWART: There was no official grievance filed. I learned later from the president of the union, that there had been some verbal conversations between the president of the union and

Ray Holmes. But it must have taken place several weeks after the February 13th date. pp. 12*

THE REFEREE: Mr. Cowart, I'd like to ask you have you seen this statement that the doctor has submitted to the Division of Employment, concerning the illness of the claimant?

MR. COWART: No, I haven't.

THE REFEREE: The Referee has just shown Mr. Cowart the physician's certification filed with the Division of Employment. Mr. Cowart, you were not aware that this claimant was under doctor's care at this time of February the 13th?

MR. COWART: This was not reported to the Coach Company. pp. 13*

THE REFEREE: On Monday morning he had a scheduled run. What time was — (Interrupted)

MR. COWART: No, no. He was listed as not available for duty on Monday, because he did not show on Sunday. He was listed for a run on Sunday. pp. 14*

THE REFEREE: Well, the claimant, sir, has referred to a policy where other people were carried OTR for a longer period of time. I don't understand from what you read of the rules there, do you have any definite time or how long you carry anybody OTR?

MR. COWART: Each one of these is evaluated, based upon the reports received from the individual. As I mentioned briefly in reference to Mr. Edbel, we were able to contact his wife and found out he was actually in bed, and was sick, so therefore, you list them OTR for this time. In the case of Ray Holmes, as far as we knew, he had not only abandoned his job, he had not called in, we had no way of getting in contact with him. We'll show you witnesses later where phone calls were made to his home, and he was completely out of the picture.

THE CLAIMANT: O.K. I have a question.

THE REFEREE: All right. Mr. Holmes do you have a question on this phone call, proceed.

THE CLAIMANT: Now, I have a letter here that said that I quit. And then I—but I was fired. Now, Mr. Cowart just stated that he contacted Mr. Engel and found it necessary—(Interrupted)

THE REFEREE: Well, now I don't want to go anymore into the separation of Mr. Edgel, the hearing is going on too long and we cannot go into all of the people who have worked for the company. I'd like to at, this time, to go ahead with the employer's testimony and establish the phone calls and if they have such testimony as Mr. Cowart has indicated, when they finish that, you, Mr. Holmes, will have an opportunity to cross examine each one.

WILLIAM COOPER, being duly sworn, testifies as follows in be half of the emplolyer: BY MR. COWART:

Q I would like for Mr. Cooper to state of his own personal knowledge the circumstances involved in this case.

THE REFEREE: All right, Mr. Cooper, proceed. pp. 16*

A (By Mr. Cooper) At 2:20 Saturday afternoon, Mr. Noxon, who was supposed to be relieved by Mr. Holmes, called in and said that he had not been relieved. So I asked him to go another round and I would try to get ahold of Mr. Holmes.

THE REFEREE: Now, you were at your home or what?

A No, I was on duty.

THE REFEREE: You were on duty?

A On duty Saturday, yes.

THE REFEREE: Mr. Noxon called you?

A Mr. Noxon called me at the bus company garage. He got me on the telephone and told me he was not relieved and I told him that I would try to get a hold of Mr. Holmes.

MR. COWART: May I interrupt please? Let the evidence show that at 2:20 P.M., the telephone did answer at the Colorado Coach Company office. Mr. Copper, personally answered it.

A And I called Mr. Holmes, and no one answered at their home.

THE REFEREE: One minute, Mr. Holmes, make a note of it, if you want, and you can question later, because I want to get this developed. Mr. Cooper, you stated you called the claimant at his home and no one answered?

A No one answered at home.

THE REFEREE: Proceed.

A And then at 3:20, Mr. Noxon called me again, and told me that he hadn't been relieved as yet, and I told him that I could not get ahold of Mr. Holmes, and would he please continue with the run until 7:05 that evening.

THE REFEREE: Very well, have you anything else to say?

A That's all I have to say.

MR. COWART: I'd like to point out that what Mr. Cooper just said amounted to 13 hours operation of a bus that day by Mr. Noxon.

THE CLAIMANT: That's against the law isn't it?

MR. COWART: That this was caused by — caused undue hardship on the company, as the result of this employee. He did not report in and 13 hours is over what a normal bus driver should drive a bus. But these were — the situation created an emergency condition. pp. 17*

THE REFEREE: All right. Mr. Holmes, do you have a question to ask of Mr. Cooper?

THE CLAIMANT: Yes, first of all, he said that he called my house at 2:20. Well, at 2:20 I was in the bed, my wife was washing and I couldn't answer the phone, so I don't say that you didn't call. But I couldn't answer the phone because my back—.

MR. COOPER: Well, no one answered the phone.

THE CLAIMANT: Yes, well, no one answered the phone.

MR. COOPER: Well, I said no one answered the phone.

THE CLAIMANT: O.K. fine. I'm sorry I have no squawk with you. Now, Mr. Cowart is saying that Mr. Noxon, I brought hardship on Mr. Noxon. Well, this is very well true 13 hours, but I have worked a lot of these 13 hours. Now then if you have not respected me then this is a horse of another color. Plus the fact, the evidence, that I was sick and I couldn't relieve Mr. Noxon. This is the point, I'm holding this to be self-evidence.

THE REFEREE: All right. Mr. Cowart, have you some more witnesses?

MR. COWART: Mr. Pumphrey is here with us, and in listening to this is there anything you want to say?

THE REFEREE: One minute please.

O. B. PUMPHREY, being duly sworn, testifies as follows in behalf of the employer: BY THE REFEREE:

Q Mr. Pumphrey, have you anything to add to this, any direct testimony?

A No, I think just about all of it has been said.

Q Have you any personal information about any of the things that happened on that weekend? pp. 18*

A (By Mr. Pumphrey) Well, nothing but about a week before, he spoke and said he was going to the dog races.

THE REFEREE: He said he was going to the dog races, when?

A Right. When do the dog races start? I don't know when they start, but Denver up there, Loveland, or where ever they started.

MR. COWART: Byers.

THE REFEREE: You don't have any information that he went he just told you the week before that he was going?

A I don't have any information that he went, but he said that he was you know, going to quit and go to the dog races.

THE REFEREE: Mr. Holmes, have you any questions to ask Mr. Pumphrey?

THE CLAIMANT: No, I have never mentioned that I was going to the dog races. But in case, even that I did, the fact was that I was under the doctor's care and I couldn't very well easily go to the dog races, my back was — I was down in my back.

THE REFEREE: Have you any other testimony, Mr. Cowart?

MR. COWART: I have no further testimony.

THE REFEREE: Mr. Holmes, have you any further testimony?

THE CLAIMANT: No, I don't.

THE REFEREE: I think we've covered this separation from the Colorado Coach Company. And we won't come back to this again, so if you people who are from the Coach Company desire to leave you may, if you wish to stay you may.

MR. COWART: Thank you, we'll leave.

RAYMOND WENDELL HOLMES, the claimant, having been sworn, testified further in his own behalf: BY THE REFEREE:

Q Joslyn Fruit Company, you worked, according to our information, you were separated from them on July 2, 1970, does that seem correct to you?

A Yes.

Q Did you quit there, or were you discharged? pp. 19*

APPENDIX I

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CONCILIATION FAILURE
NOTICE OF RIGHT TO SUE

CASE/CHARGE NUMBER
YDE5-195

The Commission has found reasonable cause to believe your charge of employment discrimination is true but has not entered into a conciliation agreement to which you would have been a party because attempts to achieve such a voluntary settlement with the respondent(s) have been unsuccessful.

The Commission has determined that it will not bring a civil action against the respondent(s) and accordingly is issuing you this Notice of Rights to Sue. The issuance of this Notice terminates the Commission's processing of your charge, except that the Commission may seek status as intervenor if you decide to sue on your own behalf as described below.

If you want to pursue your charge further, you have the right to sue the respondent named in this case in the United States District Court for the area where you live. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT IS LOST.

If you do not have a lawyer or are unable to obtain the services of a lawyer take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

You have a right to inspect and copy information contained

in the Commission's case file for use in a public court proceeding if you decide to sue. If you want to inspect this material, need help in filing your case in court or have any questions about your legal rights contact the EEOC representative named above.

An information copy of this Notice has been sent to the respondent(s) named in your case.

December 19, 1975
Date

JAMES G. STONE
Deputy District Director

APPENDIX II

State of Colorado
Department of Labor and Employment
DIVISION OF EMPLOYMENT
1210 Sherman Street
Denver, Colorado 80203

NOTICE OF APPEAL TO REFEREE

DD-No. 5496-71
RD-No.

SS No. 458-58-4796

Appellant:
Raymond Wendell Holmes
424 Placid Road
Colorado Springs, Colorado 80910

Appellee:
AACT No. 01197.00
Colorado Springs, Coach Company
Box 1180
Colorado Springs, Colorado 80901

A hearing before a Referee has been requested by the above-named appellant for the purpose of reviewing a decision issued by a Deputy of the Division of Employment. The appellant has given the following reasons for this appeal:

BM-20 filed on Joslyn Fruit Company

First of all, I called the office the morning of my termination and a lady in the office took the call and I told her to tell the foreman that I wouldn't be coming back to work. I was promised

a job at Colorado Springs Coach Company any time I wanted it by Mr. Cowart. I went to work the next day after telling Mr. Cowart that I wanted my old job back. This was in July, 1970. Joslyn Fruit Company stated in the letter I received from your office that I hadn't been offered a better job. This is not true. I have a family of six to take care of and I could not on the rate of pay I received and the hours. The job was only temporary when I accepted, but I needed the work. I could not depend on it as it was only seasonal and not much at all.

BM-20 filed on Colorado Springs Coach Company

First of all, I did not quit work. I was fired as I have the letter to prove and secondly, it was February 13, 1971, that I did not report to work and not February 5, 1971, as Colorado Springs Coach Company claims. I called the office on February 13 in the evening. No one answered. I belonged to the Transit Union which states as one of its laws that if a driver does not report to work and does not call, he is put on O.T.R. I did call. I have my doctor's report of my back injury and I turned it in to the employment office. No doctor's report was ever requested by Colorado Springs Coach Company until I applied for compensation. I was the only negro driver there and I have seen many white drivers put on O.T.R. without calling at all. I do not see why I should be treated differently. I was reported to have quit when truthfully I was fired as my letter proves and reasons were stated in their report to you other than what was written in my letter of termination.

You will be notified of the place and the date of hearing or of other action of the Colorado Division of Employment.

All issues and factual matters affecting claimant's eligibility and qualifications for benefits will be heard under Chapter 82 of the Colorado Revised Statutes 1963 as amended. The referee is not bound by the findings or decision of the deputy

and the hearing will be in the nature of a trial on all relevant issues.

The particular sections cited by the Deputy were: 82-4-8 (6) (b) (vii) 82-4-8 (4) (c) (i)

FOR DEPARTMENT USE ONLY:

Date Mailed: March 29. 1971

Dale Claim Filed: February 18. 1971 (initial)
Date of (Separation) (Refusal): July 2. 1970: February 5. 1971
Deputy's Decision Mailed: March 22. 1971
Date of Appeal to Referee: March 25. 1971

APPENDIX III

STATE OF COLORADO
DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF EMPLOYMENT
1210 SHERMAN STREET – DENVER, COLORADO 80203
AREA CODE 303, TELEPHONE 222-1551

REFEREE'S DECISION

Raymond Wendell Holmes
424 Placid Road
Colorado Springs,
Colorado 80910
SS No. 458-58-4796
(Appellant)

REGARDING UNEMPLOYMENT
INSURANCED CLAIM OF

INTERESTED PARTY
Joslyn Fruit Company
and
Colorado Springs Coach
Company

TYPE OF CASE
Voluntary Quit

APPEARANCES: The claimant appeared in person. Employer, Colorado Springs Coach Company was represented by Byron Cowart, President and General Manager; William Cooper, Superintendent of Transportation, and O. B. Pumphrey, Shift

Foreman. The employer, Joslyn Fruit Company was represented by Charlie Wood, General Manager. This hearing was held on April 19, 1971, in Colorado Springs, Colorado.

ISSUE: The claimant appeals the deputy's decision finding he was entitled to No Award of benefits by reason of separation from employment on July 2, 1970 and February 5, 1971, under the provisions of Chap. 82-4-8 (6) (b) (vii) and 82-4-8 (4) (c) (i), Colorado Rev. Stat., 1963, as amended.

FINDINGS OF FACT AND CONCLUSIONS: The claimant worked for Joslyn Fruit Company for several months prior to July 2, 1970. The claimant's testimony established that he considered this temporary, seasonal employment, and that he left because he was not making enough money to support his family. At the time he quit he believed he could be rehired by Colorado Springs Coach Company, a previous employer, but he did not have a definite job offer and, in fact, did not begin work with that company until July 15, 1970.

It is concluded that the claimant quit his job with Joslyn Fruit Company on July 2, 1970 to look for another job, and he is entitled to No Award of benefits.

The claimant had two periods of employment with Colorado Springs Coach Company, the last period being from July 15, 1970 to February 13, 1971. The testimony of the claimant established that on July 13, 1970 he worked his regularly scheduled morning run and that in the break before his afternoon run he was playing basketball with his son and injured his back necessitating medical attention, and that he was unable to make the afternoon run. The claimant testified he attempted to call the employer but did not get an answer on the telephone and assumed he would be put on "Out Till Report" on the board.

Testimony of employer representatives established that no

report was received from the claimant the afternoon of July 13, 1970 that two phones were available for him to call in on, that a foreman was present to answer the telephone and in fact did receive a call from the driver whom the claimant was expected to relieve, that an attempt was made to call the claimant at his home but the telephone was not answered, and that the claimant's failure to notify the employer in advance of his inability to meet his assignment created an emergency and the other driver had to work thirteen hours in a stretch. It was further established that the claimant failed to meet his Sunday schedule or to call in, and on Monday the employer sent him a letter of discharge.

The claimant contended he was treated differently from other drivers because of his race. The Referee finds no evidence of racial discrimination. The claimant was a member of Amalgamated Transit Union Local No. 19. No grievance was filed.

The claimant was a member of Amalgamated Transit Union Local No. 19. No grievance was filed.

It is concluded that the claimant was discharged when he failed to make his scheduled runs or to inform the employer of his reason, and he is found to be responsible for his discharge and is entitled to No Award of benefits.

DECISION: The separation from Joslyn Fruit Company on July 2, 1970 is covered by section 82-4-8 (6) (b) (vii) of the law and the claimant is entitled to No Award. The decision of the deputy is affirmed.

The separation from Colorado Springs Coach Company on February 13, 1971, is covered by the Optional Award Authority in Section 82-4-8 (7) of the law and Regulation 39-C and the claimant is entitled to No Award. The decision of the deputy is modified as to citation of law and as modified is affirmed.

ps

Mary K. Rodge, Referee

APPENDIX IV

LABOR III – EMPLOYMENT SECURITY

82-5-10. Appeal to courts.—(1) Any decision of the commission shall be final unless a petition to review same shall be filed by an interested party. Every petition for review shall be in writing and shall specify in detail the particular errors and objections. Such petition must be filed within ten days after the entry of the decision of the commission unless further time is granted by the commission within said ten days, and, unless so filed, said decision shall be final. All parties in interest shall be given due notice of any decision of the commission, and said period of ten days shall begin to run only after such notice, and the mailing of a copy of the said decision addressed to the last known address of any party in interest shall be sufficient notice.

(2) No action, proceeding or suit to set aside, vacate, or amend any findings or decision of the commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the commission for a review as herein provided.

APPENDIX V

ARTICLE 5

Claims for Benefits

82-5-11. Court review.—Such action, proceeding, or suit must be commenced within twenty days after the final findings or decision of the commission, and any party aggrieved thereby may secure judicial review thereof by commencing an action in the court of appeals for the review of the commission's findings or decision in the same manner as reviews are now provided by law in workmen's compensation cases. The commission, in its discretion, may also certify to such court questions of law involved in any decision by it. In any judicial proceeding under sections 82-5-1 to 82-5-11, as amended, the findings of the commission as to the facts, if supported by substantial evidence and in absence of fraud, shall be conclusive. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the workmen's compensation law of this state. If the supreme court reviews the judgment of the court of appeals, such review shall be limited to a summary review of questions of law. Any such action shall be advanced upon the calendar of the supreme court, and a final decision shall be rendered within sixty days after the supreme court grants further appellate review.

CERTIFICATE OF SERVICE

I hereby certify I have, in compliance with U. S. Supreme Court, Rule 33, para.3(b), this _____ day of February, 1976, deposited three (3) copies of the foregoing Response to Petition for Writ of Certiorari in the U.S. Mails, first class – postage prepaid, and addressed to petitioners:

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